Cohen Law Group

July 24, 2019

FILED ELECTRONICALLY

Ms. Marlene H. Dortch, Esq., Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)*

Dear Secretary Dortch,

Clackamas County, Oregon respectfully submits this letter to briefly respond to one aspect of the April 18, 2019 *Ex Parte* letter by the NCTA – The Internet & Television Association, Comcast, Charter, and Cox, and to provide the Federal Communications Commission with specific information regarding the vital role of Public, Educational, and Governmental (PEG) access channels in our communities.[1]

Clackamas County strongly urges the Commission to decline to adopt the NCTA's interpretation of, "a rebuttable presumption that no more than three linear PEG channels is adequate in most markets."[2] Clackamas encourages the FCC to affirm the *First Report and Order*'s determination that, "adequate PEG channel capacity" means "satisfactory or sufficient" PEG channel capacity.[3]

The April 18, 2019 *Ex Parte* letter by the NCTA – The Internet & Television Association, Comcast, Charter, and Cox (collectively, "NCTA") asserts, in relevant part, the following:

> "The parties urged that if the Commission determines it cannot establish a value for PEG channel capacity to offset against the franchise fee at this time, then it would be important for the Commission to at least provide guidance in the forthcoming order ("Third Order") as to what constitutes "adequate" PEG channel capacity under Section 621(a)(4)(B) to promote compliance with this statutory constraint…[t]he parties proposed, in particular, that the Commission establish the

[1] NCTA – The Internet & Television Association *Ex Parte*, MB Dkt. No. 05-311 (filed Apr. 18, 2019).

[2] *Id.*

[3] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) ("*First Order*").

following guidance regarding what constitutes "adequate" PEG channel capacity in the Third Order:

- The Commission should establish a rebuttable presumption that no more than three linear PEG channels is adequate in most markets. Where franchising authorities require that a channel be simulcast in multiple formats (e.g., standard-definition and high-definition), each simulcast should count as a separate channel.

- A franchising authority could rebut the presumption that three channels is adequate by demonstrating that local community needs justify a higher number of channels. Conversely, a cable operator could rebut the presumption by showing that fewer than three channels are adequate for a particular community.

- Relevant factors for determining the adequate number of channels should include: (1) the amount of new, original, and locally originated programming on PEG channels, as well as limits on repeat and "filler" content, as numerous states already require; (2) the number of channels relative to the population served; (3) a demonstration that the franchising authority has the resources necessary to support operating the number of format of channels requested; and (4) the bandwidth requirements and other costs to the cable operator of additional channels and high-resolution formats.

- Any disputes over the adequacy of PEG channel designations that are not resolved through negotiation could be heard by the Commission or brought in federal or state court if this option is specified in the applicable franchise agreement.

The parties noted that establishing this guidance in the form of a rebuttable presumption is well within the Commission's authority and should help to deter unreasonable PEG channel capacity demands while still maintaining flexibility to address the needs and interests of each local community, including those that may justify more than three PEG channels. It would also benefit franchising authorities, PEG providers, and cable operators in future negotiations by helping to minimize disputes."[4]

Clackamas County ("Clackamas") respectfully responds that the NCTA's *ex parte* lobbying of the FCC to reinterpret the legal definition of "adequate" public, educational, and governmental access channel capacity is wholly inconsistent with the procedural obligations of agency rule-making, as well as the prior determinations of the FCC.

The relevant portion of Section 621(a)(4) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"), provides:

[4] NCTA – The Internet & Television Association *Ex Parte*, MB Dkt. No. 05-311 (filed Apr. 18, 2019) at 5.

(4) In awarding a franchise, the franchising authority—

(A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;

(B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and

(C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.[5]

The FCC has previously addressed the requirement of "adequate" public, educational, and governmental access channel capacity in its *First Report and Order*.[6] In the FCC's interpretation, "while section 611(b) does not place a limit on the amount of channel capacity that a franchising authority may require, section 621(a)(4)(B) provides that a franchising authority may require "adequate assurance" that the cable operator will provide "adequate" PEG access channel capacity, facilities, or financial support. We [the FCC] determined that "adequate," as used in the statute, should be given its ordinary meaning—"satisfactory or sufficient."[7]

Via the *Second Further Notice of Proposed Rulemaking* ("*Second FNPRM*"), the FCC has proposed to issue new rules interpreting relevant statutory provisions of the Cable Act.[8] The *Second FNPRM* does not address section 621(a)(4)(B) and does not propose any rule-making that would reinterpret the *First Report and Order's* previous determination that "adequate PEG channel capacity" means "satisfactory or sufficient" PEG channel capacity. The *Second FNPRM* does not contain the word "adequate."

A reinterpretation of Section 621(a)(4)(B) by the FCC to establish in the *Third Order*, in the words of the NCTA, "a rebuttable presumption that no more than three linear PEG channels is adequate in most markets" would require fact-finding or data analysis to support its legal conclusions. "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions."[9] Thus, "if an agency wants the

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[5] 47 U.S.C. § 541(a)(4).

[6] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) ("*First Order*").

[7] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Draft Third Report and Order, FCC-CIRC1908-08 (rel. Jul. 11, 2019) ("*Draft Order*") at 24 – 25, para. 42.

[8] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Further Notice of Proposed Rulemaking, 33 FCC Rcd. 8952 (2018) ("Second FNPRM").

[9] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (*Encino Motorcars*).

federal courts to adopt (much less defer to) its interpretation of a statute, the agency must do the work of actually interpreting it."[10] Insofar as the *Second FNPRM* did not propose to reinterpret or change the legal definition of adequacy in Section 621(a)(4)(B), the eventual *Third Order* should not redefine adequacy of PEG channel capacity, facilities, or financial support *sua sponte*, without proper public notice and comment.

In its initial Comments in this matter, the NCTA did not advance any direct argument with respect to Section 621(a)(4)(B) and the standard of adequate PEG channel capacity, facilities, and financial support.[11] Nor did the NCTA raise this issue in its Reply Comments in this matter.[12] The NCTA now proposes its idea of a "rebuttable presumption that no more than three linear PEG channels is adequate in most markets" in *ex parte* communications. As best discerned from its *ex parte* letter, the NCTA's pick of "three" as the number of channels and "most markets" as the geographic coordinates is arbitrary.

In its letter, the NCTA claims it, "submitted numerous examples of franchising authority demands for excessive numbers of PEG channels" with a citation to NCTA Reply Comments, Appendix (*Examples of Franchising Authority Overreach*) at 10-11.[13] Numerous may be a generous description, as the Appendix actually contains just three examples under the heading "LFA PEG Channel Capacity Requirements." In fact, the local franchising authority that the NCTA misleadingly characterizes as demanding, "as many as 43 PEG channels" is New York City.[14] The City of New York is the most populous city in the United States.[15]

Evidence from the NCTA's own Appendix demonstrates that adopting a "rebuttable presumption that no more than three linear PEG channels is adequate in most markets" would destroy the "adequate public, educational, and governmental access channel capacity, facilities, or financial support" requirement of Section 621(a)(4)(B) and the FCC's prior interpretation of adequate as "satisfactory or sufficient" PEG channel capacity. That local franchising authorities and cable operators in New York City, negotiating at arm's length and possessed of the judicial remedies afforded in the Cable Act, have mutually agreed to provide as many as 43 PEG access channels per operator is evidence that sophisticated parties are sufficiently capable of determining "satisfactory or sufficient" access capacity.

In Clackamas County, located in the Portland, Oregon Metropolitan Area, there are currently nine cable operators. These cable operators range from the largest in the country (i.e., Comcast) to among the smallest in the country (e.g., several cable systems run by subsidiaries

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[10] *Montgomery County, Md et al. v. FCC*, 863 F.3d 485, 491 (6th Cir. 2017) (*Montgomery County*).

[11] Comments of NCTA – The Internet & Television Association, MB Dkt. No. 05-311, (Nov. 14, 2018).

[12] Reply Comments of NCTA – The Internet & Television Association, MB Dkt. No. 05-311, (Dec. 14, 2018).

[13] NCTA – The Internet & Television Association *Ex Parte*, MB Dkt. No. 05-311 (filed Apr. 18, 2019) at 5.

[14] *Id*. at 5, fn. 25.

[15] U.S. Census Bureau, *Metropolitan and Micropolitan Statistical Areas Population Totals: 2010-2018* (July 10, 2019), https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-metro-and-micro-statistical-areas.html.

of telephone cooperatives).[16] In total, cable operators in Clackamas provision fourteen public, educational, and governmental access channels. These public, educational, and governmental access channels serve approximately 55,000 local subscribers.

Emphatically, PEG access channels and capacity provide substantial value to subscribers, the public, and programmers. Operators of public, educational, and governmental access channels in Clackamas include Clackamas County Government, North Clackamas School District (NCSD), the Oregon Trail School District, the Oregon City School District, the West Linn-Wilsonville School District, Clackamas Community College (CCC) and the Willamette Falls Media Center (WFMC). This amount of public, educational, and governmental access channel capacity is "adequate" pursuant to Section 621(a)(4)(B) because the parties determined it is satisfactory or sufficient access capacity for the needs of the community at the time.

The NCTA implores the FCC to redefine "adequate" public, educational, and governmental access channel capacity, and to create a new, amorphous set of administrative and judicial rights and remedies. "A franchise authority could rebut the presumption…a cable operator could rebut the presumption…[r]elevant factors for determining the adequate number of channels should include…[a]ny dispute over the adequacy of PEG channel designations that are not resolved through negotiation could be heard by the Commission or brought in federal or state court if this option is specified in the applicable franchise agreement."[17] Such proposals are arbitrary and contradict the plain language of the statute.

The NCTA's proposed reinterpretation would also be an improper construction of the statute because such changes would impair the existing operation of the Cable Act and have the effect of thwarting the intent of Congress. For example, a rebuttable presumption that no more than three PEG channels is "adequate" would impair Section 626(c)(1), "Renewal," which sets forth the standard upon which a local franchising authority must decide whether or not to renew a cable operator's franchise.

Specifically, Section 622(c)(1) provides that, "upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise…the franchising authority shall…consider whether…(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking in to account the cost of meeting such needs and interests."[18] In accordance with Section 626(c)(1)(D), the local franchising authority is vested with the right to consider whether the cable operator's franchise renewal proposal meets the community's future cable-related needs, depending on the cost of meeting those needs.[19]

On the one hand, the "community needs assessment" examines whether the operator's proposal is "reasonable" to meet future cable-related community needs and interests. On the

[16] Comments of Clackamas County, Oregon, MB Dkt. No. 05-311, (Nov. 14, 2018); Reply Comments of Clackamas County, Oregon, MB Dkt. No. 05-311, (Dec. 14, 2018).

[17] NCTA – The Internet & Television Association *Ex Parte*, MB Dkt. No. 05-311 (filed Apr. 18, 2019) at 5 – 6.

[18] 47 U.S.C. § 546(c)(1).

[19] 47 U.S.C. § 546(c)(1)(D).

other hand, the cable operator's obligation to meet such community needs must be considered in light of the cost of meeting such needs. In practice, cable-related "community needs assessments" include surveys, focus groups, interviews, public meetings and community-specific research that is designed to identify the cable-related needs of a wide variety of community components, such as residents (both subscribers and non-subscribers), community organizations, businesses, educational and governmental institutions, non-profits, and providers of the PEG channels. This information is then utilized in franchise negotiations for the cable operator to make a proposal (either "formal" or "informal"), designed to meet the community needs.

Over the course of twenty years, Clackamas has worked diligently to conduct multiple community-needs assessments to ensure the cable operator's franchise renewal proposal meets the community's future cable-related needs, depending on the cost of meeting those needs. The NCTA's desired interpretation, if issued, would have the result of mooting the "community needs assessment" of Section 626(c)(1)(D), thereby thwarting the intent of Congress. If a rebuttable presumption of three PEG channels is inserted into Section 621(a)(4)(B), then the franchising authority's statutory responsibility to perform a community-needs assessment in line with Section 626(c)(1)(D) is destroyed.

For the reasons stated herein, Clackamas County strongly urges the Commission to decline to adopt the NCTA's interpretation of "a rebuttable presumption that no more than three linear PEG channels is adequate in most markets."[20] Clackamas encourages the FCC to affirm the *First Report and Order's* determination that "adequate PEG channel capacity" means "satisfactory or sufficient" PEG channel capacity.

Clackamas is filing this letter electronically pursuant to Section 1.1206 of the Commission's rules. Please direct any questions to the undersigned.

Respectfully submitted,

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[20] NCTA – The Internet & Television Association *Ex Parte*, MB Dkt. No. 05-311 (filed Apr. 18, 2019) at 5.